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No. A-876

85-2156

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

SHAARE TEFILA CONGREGATION, ET AL.,

Petitioners

v.

JOHN WILLIAM COBB, ET AL.,

Respondents

BRIEF OF MICHAEL DAVID REMER IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were appellants (now petitioners) Shaare Tefila Congregation, Rabbi Martin S. Halpern, Shirley Altman, William Harkaway, Marshall S. Levin, Maurice Potosky and Dr. Jacob Teller. Petitioners will be referred to collectively herein as "the Congregation." The defendants in the District Court were John William Cobb, William Randall Harris, Thomas Lloyd Heine, William Hess, Thomas Joseph Hunt, Jr., Raymond Lee Jordan, Dominic Queen and Michael David Remer. Only Michael David Remer was an active appellee before the Court of Appeals. This Brief in Opposition is being filed by appointed counsel on behalf of Mr. Remer as a respondent in this Court.

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STATEMENT OF THE CASE

This action was filed by the petitioners in the United States District Court for the District of Maryland on March 6, 1984. The Complaint alleged both federal and state claims arising from the alleged vandalization of the synagogue of the Shaare Tefila Congregation in Silver Spring, Maryland. Federal jurisdiction was sought over claims under the civil rights statutes, 42 U.S.C. §§ 1981, 1982 and 1985(3), as well as over pendent state law claims for trespass, nuisance and intentional infliction of emotional distress.

On April 22, 1985, the district court granted a motion to dismiss the Complaint, filed by respondent Michael David Remer, under Rule 12(b)(1) of the Federal Rules of Civil Procedure.[1/] The United States Court of Appeals for the Fourth Circuit affirmed the district court's decision on March 7, 1986, holding that the petitioners had failed to state claims under the federal civil rights laws.

The petitioners now seek certiorari and a right to federal jurisdiction only on their claim under 42 U.S.C. § 1982. In their Petition, they inundated this Court with descriptions of the vandalism, of historical anti-Semitism, and of the respondents' admittedly irrational misapprehensions of Jews as members of a distinct and inferior race.[1/] As described in the Complaint, the reprehensibility of the acts of the respondents, as well as the irrationality of their political and sociological perceptions, cannot be gainsaid. The question is not whether the petitioners are entitled to pursue a remedy -- the question is whether the remedy is to be found in 42 U.S.C. § 1982. In directing the petitioners to other, non-federal remedies, the Fourth Circuit correctly applied this Court's decisions regarding the scope of the

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1/ While Mr. Remer was the only defendant to file a motion to dismiss, the district court found that its decision to decline jurisdiction required dismissal of the action against all of the defendants.

1/ The petitioners' claim that the district court, and, presumably, the Fourth Circuit, erred in excluding voluminous extra-pleading materials which they submitted relating to their anticipated proof. Petition at 8-9. Indeed, they have included in their Petition references to deposition testimony and criminal dispositions which appear nowhere in the appellate record. Petition at 4-8 and 17, n. 17. These non-record facts add nothing of legal substance to the petitioners' claim of federal jurisdiction, and, even if all of these materials are accepted without qualification, they do not better the petitioners' jurisdictional position.

federal statute, and its decision does not conflict with the positions taken by other circuits. Accordingly, certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION IS CONSONANT WITH THE DECISIONS OF THIS COURT, AND A REVERSAL OF THAT DECISION WOULD SUBSTANTIALLY EXPAND THE SCOPE OF THE CIVIL RIGHTS LAWS AND LEAD TO UNDESIRABLE CONSEQUENCES IN THE LOWER COURTS.

In seeking this Court's review of the decision of the U. S. Court of Appeals for the Fourth Circuit, the petitioners have misstated the nature of that court's holding. The Fourth Circuit did not hold that "the plaintiff in an action under 42 U.S.C. § 1982 must prove that he or she is a member of a 'non-white race,'" Petition at i, nor did it hold that, under section 1982, "plaintiffs must show that they are members of a 'racially distinct group' that is 'commonly considered to be non-white.'" Petition at 11. Rather, the Fourth Circuit held that the Jewish plaintiffs could not base a section 1982 action for race discrimination on the subjective, irrational perceptions of the defendants. Specifically, the Court of Appeals held:

> Because discrimination against Jews is not racial discrimination, and the Supreme Court has stated that section 1982 does not address discrimination on account of religion or national origin, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968), we find that the district court properly dismissed the Congregation's section 1982 claim.

(A. at 7a.)[1/]

1/ "A" references are to pages of the Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

The Fourth Circuit's holding is consonant with the prior decisions of this Court and of the lower federal courts. This Court never has held that an action under section 1982 may be based on the subjective, irrational perceptions of individual defendants. Likewise, this Court never has held that a Jewish person may bring an action under section 1982 to challenge an act of discrimination. To the contrary, as noted by the Fourth Circuit, this Court has indicated that section 1982 "is not a comprehensive open housing law," and "does not address itself to discrimination on grounds of religion or national origin." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968).

The petitioners' reliance on the Jones decision in seeking this Court's review is perplexing in light of that decision's discussion of section 1982's limitations. The petitioners quote Jones for the proposition that, in order to give section 1982 the scope that its origins dictate, it must be accorded a sweep as broad as its language. Petition at 12. However, neither the origins of section 1982 nor its specific language support the petitioners' attempted extension of that statute to reach the facts in this case.

Section 1982 had its origin in the first section of the Civil Rights Act of 1866.[1/] Tillman v. Wheaton-Haven Recreation Association, 410 U.S. 431, 439 (1973). The constitutional basis for that statute, as originally enacted, was the Thirteenth Amendment, which abolished slavery. Section 1 of the Civil Rights Act of 1866 was enacted in an

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1/ As noted in the Petition, sections 1981 and 1982 both originated in section 1 of the Civil Rights Act of 1866 and have been construed by this Court in a similar fashion. Petition at 11, n. 10, citing Runyon v. McCrary, 427 U.S. 160, 171 (1976).

effort to protect and extend the rights of the newly freed slaves. See Comment, Developments in the Law - Section 1981, 15 HARV. C.R.-C.L. L. REV. 29, 35-64 (1980). Nothing in the legislative origins of section 1982 supports its application to the desecration of a Jewish synagogue, regardless of whether the desecration was motivated by a Ku Klux Klan or Nazi inspired animus.

Furthermore, even the broadest interpretation of section 1982's language does not support application of that statute to these facts. Section 1982 provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

This Court has held that the statute originally was enacted "to protect a limited category of rights, specifically defined in terms of racial equality." Georgia v. Rachel, 384 U.S. 780, 791 (1966). It is hard to imagine how this statutory language could be extended to apply to acts of discrimination against Jews. Indeed, the total absence of cases in the lower federal courts under either sections 1981 or 1982 which involve discrimination against Jews reveals the unsupported nature of the petitioners' inventive argument.

The petitioners also quote Jones for the proposition that section 1982 "was meant to prohibit all racially motivated deprivations of the rights enumerated in the statute. . ." Petition at 13, n. 12, quoting Jones, supra at 426. The petitioners neglect to mention that the Jones decision addressed the question of whether section 1982 applies to private, as well as public, actions. Jones, supra at 413. It was in that context that this Court held that all racially motivated deprivations of rights, whether by public entities or by private individuals, were prohibited.

The petitioners' contention that the Fourth Circuit's decision conflicts with this Court's decision in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) also is without merit. The petitioners correctly note that in McDonald, this Court held that section 1981 is applicable to racial discrimination against white persons, as well as non-white persons. The extensive discussion of the legislative history of the Civil Rights Act of 1866 in McDonald, id. at 287-296, emphasizes that the statute was intended to protect individuals of "every race and color." Id. at 287, quoting Cong. Globe, 39th Cong. 1st Sess. 211 (1866). Nowhere in the legislative history of the statute or in McDonald is there even a suggestion that the statute's coverage is based on a defendant's irrational, racial perceptions, rather than on an alleged difference in the treatment accorded individuals of different races.

In this case, the petitioners do not claim that they were treated differently because they were members of a different race. In fact, they do not even claim that Jews are members of a separate race. Rather, they claim that the desecration of their synagogue was motivated by the defendants' false perception that Jews are members of a different race. This Court never has indicated that such an allegation is covered by section 1982, and nothing in the legislative history of section 1982 supports such coverage.

If the Fourth Circuit had accepted the petitioners' theory for section 1982 liability, its decision would have conflicted with this Court's prior decisions holding that section 1982 does not encompass religious discrimination. By arguing that the respondents' irrational, racial perceptions may form the basis for a section 1982 action, the petitioners are attempting to find a back door for coverage of claims of

religious discrimination. Under the petitioners' theory, any plaintiff, whether Jewish, Catholic, Mormon, or any other creed, would be able to state a claim under section 1982 simply by alleging that the defendant who wronged him was motivated by an ill-conceived racial animus. Such a broad expansion of the coverage of the civil rights laws never has been condoned by this Court.

The Fourth Circuit recognized the undesirable practical effects which would result from the petitioners' proposed extension of section 1982's coverage. In his concurring opinion, Judge Murnaghan noted that the petitioners' legal theory would lead to myriad, federal civil rights suits arising out of various defendants' misperceived notions of the racial inferiority of others:

> Yet the law is grounded on facts, not on misperceptions of fact. For persons of the ilk which the defendants, at the present posture of the case, are revealed to be to have the power to confer jurisdiction on the federal courts would, in all probability, lead to very regrettable consequences.
>
> . . . .
>
> My ethnic origins are principally Hibernian. On March 17, for one group of Irish hotheads and on July 12 for another (as well as other dates during the year), violence deriving from misperceptions, of Catholics on the one hand, or of Protestants on the other, as an inferior human sort or race has broken out, to my everlasting regret from time to time. Yet it will but contribute to disruption of our nation to accord such ill mannered and unreasoned fracases the dignity of status as civil rights controversies. They belong in the state courts, where justice, more immediate and more personalized, is likely to be at hand.

(A. at 10a.)

As suggested by Judge Murnaghan and contrary to the petitioners' argument, adequate remedies for their injuries are available under state criminal and common law. The petitioners

contend that state criminal statutes provide no compensation for victims of crime. However, in Maryland, judges are free to, and often do, award criminal restitution. In fact, criminal restitution is available under Maryland law for the very crime of which the respondents herein were accused, malicious destruction of property. MD. ANN. CODE art. 27, § 640(b) (1985). See also MD. ANN. CODE art. 27, § 641(a) (1985). The petitioners apparently are dissatisfied with the punishment which was meted out to the respondents under Maryland criminal law. Despite that dissatisfaction, it is clear that a criminal remedy was available to them.

The petitioners also contend that state criminal and common law remedies are unacceptable because they ignore the deplorable motivation for the respondents' acts. Such is not the case. The injury to individual dignity resulting from the alleged anti-Semitic acts certainly would be considered by a criminal judge in sentencing the wrongdoers and awarding criminal restitution. Likewise, the egregious nature of the alleged acts would be central in the minds of a jury deciding what amount of punitive damages to award for state tort law violations. Such punitive damages are available for all of the pendent state tort claims in the Complaint. Bender v. Bender, 57 Md. App. 593, 598 (1984) (punitive damages may be awarded in trespass cases); Gorman v. Sabo, 210 Md. 155, 164 (1956) (punitive damages may be recovered in a private nuisance case); Sere v. Group Hospitalization, Inc., 443 A.2d 33, 37 (D.C.App. 1982) (punitive damages are available for intentional infliction of emotional distress).

Finally, the petitioners incorrectly declaim that state tort and common law remedies do not provide for injunctive relief. In fact, injunctive relief is available in both nuisance and trespass cases in Maryland. Adams v. Commissioners of Trappe, 204 Md. 165, 170 (1954).

Curiously, apart from alleging pendent claims for trespass, nuisance and intentional infliction of emotional distress in their federal suit, the petitioners never have sought to recover in state court for the wrongs that they suffered. Instead, the petitioners want to use the federal civil rights laws to send a message to wrongdoers whenever they arguably were motivated by irrational, racial perceptions. The Fourth Circuit was correct in concluding that the civil rights laws simply were not intended to cover every state law claim where the plaintiff alleges that the defendant was motivated by subjective, irrational perceptions of race. Accordingly, this Court should decline to review the Fourth Circuit's decision.

II. THERE IS NO CONFLICT BETWEEN THE FOURTH CIRCUIT'S DECISION AND A RECENT DECISION OF THE THIRD CIRCUIT.

In petitioning this Court for review of the Fourth Circuit's decision, the petitioners argue that the decision is in conflict with a contemporaneous decision of the Third Circuit. In fact, the two decisions are different. Although the Third Circuit permitted an Arab to allege that he was subjected to race discrimination under section 1981, there is no indication that the court would go so far as to permit Jews to state a claim under the civil rights laws.

In Al-Khazraji v. Saint Francis College, 784 F.2d 505 (3rd Cir. 1986), the Third Circuit held that an Arab plaintiff's section 1981 claim that he had been denied tenure because of "national origin, religion, and/or race," id. at 508, n. 4, could survive a motion for summary judgment. The court did not hold that a section 1981 claim can be based on religious discrimination. Instead, it emphasized the plaintiff's racial characteristics.

Like this Court in McDonald, the Third Circuit reviewed the legislative history of the Civil Rights Act of 1866 and noted that it was enacted to protect persons of "every race and color" from discrimination. Id. at 515-516. In grappling with the sometimes ephemeral distinction between race and national origin, the court stated:

> We believe that Congress' purpose was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically and physiognomically distinctive.
>
> . . . .
>
> While the distinction between racial discrimination, which is cognizable under Section 1981, and other types of discrimination, which may not be cognizable, may in some instances be obscure, that cannot justify refusing to attempt the distinction. Discrimination based on race seems, at a minimum, to involve discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens.

Id. at 517. Clearly, the Third Circuit did not base its description of the coverage of section 1981 on the subjective perceptions of the individual defendants, the standard urged by the petitioners herein. In fact, the court requires the very showing of ethnic and physiognomical distinctions to establish section 1981 coverage which the petitioners criticize.

The Third Circuit's decision is one of a series of decisions in the lower courts which have tried to evaluate whether discrimination on account of national origin ever constitutes race discrimination under the civil rights laws.[1/] This Court never has addressed that issue.

1/ For a discussion of the applicability of section 1981 to national origin employment discrimination cases, see Annot., 43 A.L.R. Fed. 103 (1979).

Furthermore, that issue is different from the issue presented by the petitioners. The Third Circuit certainly did not decide whether Jewish plaintiffs may bring a section 1981 action against defendants who injure them out of an irrational, anti-Semitic animus. To the contrary, the court's emphasis on the plaintiff's physical characteristics would preclude the petitioners from suing under the civil rights laws in the Third Circuit.

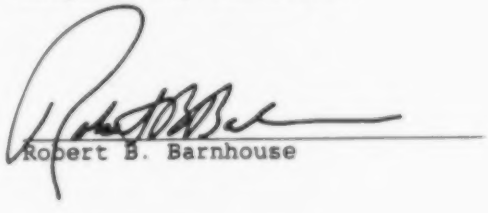
No federal court has extended the civil rights laws to encompass claims of religious discrimination because of the false racial perceptions of individual defendants. To the contrary, the lower courts that have been confronted with the claims of Jews under the civil rights laws have indicated that persons of the Jewish religion are not members of a group protected by section 1981. Wald v. International Brotherhood of Teamsters, 24 Fair Empl. Prac. Cas. (BNA) 616, 619 (C.D.Cal. 1980) (distinguishing Hispanic national origin cases, the court noted that the weight of authority supports the view that claims of discrimination against Jews do not fall within section 1981); Weiss v. Willow Tree Civic Association, 467 F. Supp. 803, 816 (S.D.N.Y. 1979) (the court rejected the section 1982 claim of a group of Hasidic Jews who, like the petitioners, sought to characterize their religious claim as a race claim); Budinsky v. Corning Glass Works, 425 F. Supp. 786, 788 (W.D.Pa. 1977) (the court noted that persons of Jewish origin are not protected by section 1981 because they are not commonly identified as a race nor subjected to the kind of racial discrimination which is the target of section 1981); Marlowe v. Fisher Body, Div. of General Motors Corp., 11 Fair Empl. Prac. Cas. (BNA) 1357 (E.D.Mich. 1975) (Jewish worker had no section 1981 claim because Jewishness is not a race).

Neither the Third Circuit decision in Al-Khazraji nor any other federal court decision has accepted the petitioners' theory for section 1982 coverage. That theory pushes the statute's coverage far beyond anything which previously has been recognized by the lower federal courts. Under the circumstances, this Court should deny the petition and refuse to review the Fourth Circuit's decision.

CONCLUSION

There is no compelling reason for this Court to exercise its jurisdiction by granting petitioners' writ of certiorari. This case was decided correctly by both the District Court and the Fourth Circuit. The decisions of this Court do not permit an action under section 1982 to be based on religious discrimination nor do they permit a section 1982 action to be based solely on the subjective, irrational perceptions of individual defendants. The Fourth Circuit's decision does not deprive the petitioners of a remedy for the wrongs which they have suffered because adequate state law remedies are available. Finally, there is no conflict among the circuits. No federal circuit court has held that the jurisdiction of the federal courts under the civil rights laws is determined by the misperceptions of defendants. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

As a member of the Bar of this Court, I hereby certify that on this 5th day of September, 1986, a copy of the foregoing Brief of Michael David Remer in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and of the Motion for Leave to Proceed In Forma Pauperis was mailed, postage prepaid, to Patricia A. Brannan, Esquire, David S. Tatel, Esquire, Joseph M. Hassett, Esquire, and Steven P. Hollman, Esquire, Hogan & Hartson, 815 Connecticut Avenue, N.W., Washington, D.C. 20006, and to Irvin N. Shapell, Jewish Advocacy Center, Suite 512, 10400 Connecticut Avenue, Kensington, Maryland 20895, counsel for petitioners. A copy also was mailed to the following additional counsel and unrepresented respondents:

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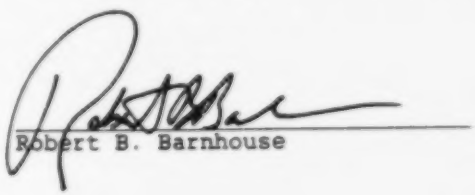

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